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IN THE

Supreme Court of the United States

October Term, 1954.

No. 163.

CHARLES LAWLOR and MITCHELL PANTZER, Co-Partners Trading as INDEPENDENT POSTER EXCHANGE,
Petitioners,

v.

NATIONAL SCREEN SERVICE CORPORATION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY BRIEF FOR RESPONDENTS.

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I. RES JUDICATA.

Petitioners' Reply Brief disfigures our argument about the injunctive remedy sought in their prior action as if we raised merely a quibble between legal and equitable relief. Surely petitioners must suspect a deeper purpose or they would not address themselves to this point as the major focus of reply.

The significance of the prayer for injunctive relief in the prior action is that the judgment of dismissal with prejudice established that petitioners were not entitled to enjoin the acts of which they now complain and again seek to enjoin. (The authorities are cited at page 13 of our original brief.)

The prayer to enjoin in both actions only italicizes the applicability of res judicata. For since the cause of action was the same, respondents' future conduct, which is the sole pretense for justifying the second suit, could have been prevented by judicial edict, if petitioners had pursued their prior action and been able to sustain it. Instead [admitting that they were advised by their own counsel that they "had no case" (R. 147)], they surrendered their legal and injunctive remedy with the same effect as if judgment had been rendered for the defendants after trial. 2 **Freeman, Judgments** § 757 (5th ed. 1925); **United States v. Parker**, 120 U. S. 89, 95 (1887). If res judicata should not bar an action for injunction where the basic claim is the same, and the acts judicially established to be valid (in so far as these petitioners are concerned) may again be challenged in the future, then settlement would be a pause rather than a stop in litigation.

Petitioners cannot and do not dispute the identity of the basic claim asserted in the prior and present actions. In the lower courts the identity was expressly conceded.

In their brief in the district court petitioners flatly wrote (p. 2):

> "• • • The complaints filed in these actions are substantially alike and both actions are based on the same alleged illegal contracts. • • •"

In the court of appeals, petitioners repeated this concession (p. 6 n. 6):

> "Plaintiffs concede that the exclusive license agreements on which this [prior] action was based were substantially the same as the contracts on which the instant action is based. In fact, in the case of Loew's the same contract appears in both actions."

Petitioner himself testified (R. 126):

> "Q. When the complaint was filed in the former action did you read it?
>
> "A. Yes.
>
> • • •
>
> "Q. And you know that the same grievances are asserted in your present action against National Screen, don't you?
>
> "A. Yes."

Both lower courts found identity of the cause of action after close examination of the complaints (R. 78-79, 157). Petitioners' concessions only pointed to the inevitability of this ruling. It is this identity which is the determinative factor for preclusive adjudication. The prayer for injunction in the prior action only garnishes the conclusion by demonstrating the emptiness of petitioners' contention that continued conduct (already held valid) justifies relitigation.

II. ESTOPPEL.

Petitioners' Reply Brief purports to respond to our argument of estoppel under the heading "Reply to Argument on Pari Delicto". We have never asserted "pari delicto", and this is a bolder attempt at semantic transmutation than is ordinarily encountered. Estoppel is based on the traditional doctrine that participation in contract relationship estops the beneficiary from challenging it while pocketing its resultant proceeds. We have always insisted that the exclusive contracts were lawful and therefore there was no "delictum" in which petitioners could participate.

Seeking to escape from estoppel, petitioners decry the settlement agreement made by them in 1943 and renewed in 1946 stating (p. 3): "The fact is that petitioners received few if any benefits" therefrom. There follows a listing (inaccurate to boot) of the "principal burdens and disadvantages" in the settlement sublicense agreement.

The principal benefits and advantages are ignored. We shall not list them, nor seek to establish the overwhelming favorable balance to petitioners. It is to be noted that after the surrender by National Screen of its exclusivity so as to afford sublicenses to petitioners and others for its copyrighted posters, petitioners as they concede doubled their business (R. 116, 150) and increased their profits (R. 116).

But we do not conceive that any court will review a settlement agreement, 12 years after the parties have lived under its roof and accepted its shelter, for the purpose of determining in a collateral proceeding whether it was advantageous to one of the parties. If settlement agreements, or any other contracts, had to pass muster on retrospective examination as to whether the scales of benefits and burdens are precisely balanced, how many would survive?

Petitioners' claim of duress because they signed the settlement agreement "only because they lacked the financial resources to continue the fight" (p. 5), even if true, is not duress. Such a standard would subject every settlement to a subsequent test of validity based on the financial status of the parties. If financial distress at the time of making a contract is to be deemed an exoneration from it, would it not follow that inquiry should be made of other distressful pressures, such as ill health or family difficulties? Judge Kirkpatrick defined "duress" as a legal concept (R. 81) and properly rejected petitioners' contention with understandable asperity when he wrote (R. 81-82):

> "* * * Reading the complaint, one is forced to the conclusion that, unless the plaintiffs believed either that they could not prevail in the action or that the Court was incapable of granting relief, they must have settled because they found it more advantageous to accept a license than to pursue their action. They

were represented by counsel and consummated the settlement by consenting to a judgment against themselves. The fact that a party, for whatever reason, finds that the advantages of a settlement outweigh the advantages of pursuing the law suit does not constitute duress. Considerations unconnected with the subject matter of the suit, including the business situation of the parties and economic pressures, enter into most settlements, and there are hardly any of them that could not be attacked on the same kind of grounds that the plaintiffs here allege. * * *"

A unanimous court of appeals succinctly underlined this judicial answer to petitioners' present contention. Judge Goodrich wrote (R. 157-158):

> "The plaintiffs claim that the 1942 suit was settled because of 'duress'. Of course it is not suggested that there was any physical compulsion. What is meant is that their economic position was such that this was the best settlement they could get. It is well settled that merely because one enters into an agreement which he would not enter if he did not need the money there is not such duress as will void the contract. See Rector v. Suncrest Co., 52 F. 2d 946 (C. A. 4, 1931); and Restatement, Contracts § 494 (1932)."

The petitioners quarrel with our citations of their admissions that there was no duress, on the ground that questions put to them "were obviously leading" (p. 5). But it is not denied that petitioners answered in the affirmative time and time again, making a shambles of the present preposterous "duress" theory, since they executed general release (R. 114, 127), signed sublicense settlement agreement (R. 113, 123), advised with counsel (R. 119, 123, 128, 149) and other plaintiffs (R. 114, 121; 127-8), executed renewal sublicense agreement three years later (R. 107, 151), insisted upon receiving materials thereunder for 12

years to this day (materials fabricated under then existing exclusive arrangements as well as under subsequently acquired agreements) (R. 116, 117, 130), never offered to surrender the sublicense, and on the contrary always insisted that it be kept alive (R. 116, 123).

III. ACCURACY.

The prejudicial charge of inaccuracy made in petitioners' Reply Brief is totally unwarranted. Below is confirmation of every original statement:

1. The five respondents who were not named as parties to the prior action **were** there charged as participants in the alleged conspiracy. The charge of conspiracy against the producers in the present case is based on the making of the exclusive licenses with National Screen, and the prior complaint unquestionably charged that National Screen was attempting to make such licenses with all motion picture producers. Petitioners quote from two paragraphs of the prior complaint and emphasize that one of the five new defendants was not there identified by name, but they fail to refer to another paragraph (R. 95):

> "30. On or about the date of these transactions, the defendant-National inaugurated, has since actively pursued and is now engaged in enforcing and maintaining a policy and practice whereby it intends to acquire the exclusive distribution privileges of all motion picture advertising matter prepared and distributed by **all the producers of motion pictures**, and the acts herein recited are all part of and in pursuance of said plan and policy."[1]

2. Our reference to Judge McGranery's statement as to the producers' valid motivations in concluding exclusive licenses with National Screen was correct. Judge McGranery said (R. 69-70):

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1. Wherever boldface type is used in this brief, the emphasis is ours.

> "* * * The affidavits submitted by the defendants **clearly indicate** that each producer-distributor entered into its agreement with National Screen **independently, for legitimate business reasons related to its own enterprise** * * *."

3. Petitioners make a point of the fact that the printed excerpts from the contract between Loew's Incorporated and National Screen refer to distribution only (R. 54-56). Since none of the contract provisions is relevant to the issues on this appeal, the present record contains only the fragmentary provisions from the Loew's contract printed by petitioners in the court of appeals.

However, the relevant portions of all the contracts were before the district court (R. 49-53), and both Judge McGranery and Chief Judge Kirkpatrick recognized that the contracts were licenses for manufacture as well as distribution and that National Screen in fact performs both functions (R. 61, 64 n. 7, 67, 76). Furthermore, petitioners' own amended complaint similarly characterized the contracts (R. 11):

> "24. Plaintiff is informed, believes and therefore avers, that defendant NATIONAL has obtained from defendant-producers exclusive contracts for the **preparation** and distribution of standard accessories and advertising materials * * *."

Both petitioners have stated the same fact under oath, one in an affidavit (R. 46), and both of them in oral testimony (R. 114, 136).

4. The statement at page 8 of our original brief (in the Summary of Argument), calling attention to petitioners' previous concession of the identity of the cause of action, is set forth more fully, and with quotation of petitioners' own language, at page 12 of the brief. And see pages 2-3 *supra*.

5. Petitioners' assertion that the sublicense agreement resulted in an overall increase in their cost of material is refuted by the testimony in this record. The testimony shows that the prices charged by National Screen to petitioners were lower than the prices charged them by the producers (R. 110-112, 130-133), that these lower prices applied to all standing orders from National Screen under the sublicense (R. 134), that these standing orders accounted for the "greatest part" of the materials purchased by petitioners (R. 132, *cf.* 133-134), and that postage charges were added only in the case of reorders above the standing order (R. 28, 134), the size of which was always subject to petitioners' sole control (R. 28-29). Nowhere has either petitioner testified that postage charges or any other factor increased petitioners' overall cost of material under the sublicense agreement.

IV. CONCLUSION.

Petitioners' Reply Brief takes aim at matters not determinative of this appeal. That the aim was wild and off target is not as significant as that the real issue was not even sighted.

The identity of the cause of action in the prior and present actions; the inviolate nature of the consent dismissal with prejudice, which may not be attacked collaterally here; and the estoppel arising from petitioners' own inconsistent conduct over a dozen years,—these are the untouched precepts requiring affirmance.

Respectfully submitted,

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